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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

VICTORIA BUCKLEY,
SECRETARY OF STATE OF COLORADO,

Petitioner,

v.

AMERICAN CONSTITUTIONAL
LAW FOUNDATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ALASKA, ARIZONA, CALIFORNIA, IDAHO, IOWA, KANSAS, MAINE, MISSISSIPPI, OKLAHOMA, OHIO, OREGON, AND SOUTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

1. Twenty-three states, including Colorado and Washington, have a process under which citizens may seek to place legislation on the election ballot.[1] The process involves circulating the proposed legislation among the state's registered voters for the purpose of soliciting signatures on an initiative petition. If a sufficient number of signatures are secured, the initiative is placed on the election ballot.[2] If approved by a majority of voters casting votes at the election, the proposed legislation contained in the initiative becomes law.

Although the regulation of the initiative process varies from state to state, there are common types of regulations. Initiative proponents are typically required to file a copy of the proposed legislation with the state prior to circulating the initiative.[3] Some states prescribe a time period within which initiative petitions are required to be filed; for example, 10 months prior to the election at which the initiative is to be submitted.[4] The form of the petitions

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[1]Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 16-17 (1997).

[2]For example, Washington requires that initiative petitions obtain a number of signatures equal to or exceeding eight percent of the votes cast for the office of governor at the last regular gubernatorial election. Wash. Rev. Code § 29.79.120 (1996).

[3]*See, e.g.*, Wash. Rev. Code § 29.79.010 (1996); Ariz. Rev. Stat. Ann. § 19-111 (West 1990 & West Supp. 1997).

[4]*See, e.g.*, Wash. Rev. Code § 29.79.020 (1996).

is typically specified by statue.[5] In many states, a state official prepares a ballot title for or summary of the proposed legislation, which must be contained in all petitions.[6] For example, in Washington State, the summary is required to "give a true and impartial statement of the purpose of the measure"; the summary may not "intentionally be an argument, nor likely to create prejudice, either for or against the measure".[7]

Signatures on initiatives must be those of voters registered to vote in the state.[8] Voters signing initiative petitions are required to give their names and addresses.[9] Voters are prohibited from accepting payment in exchange for their signature on a petition, and it is illegal to offer to pay a voter to sign a petition.[10] Petitions containing signatures must be filed with the state by a certain date to enable the state to determine whether sufficient signatures

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[5]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Ariz. Rev. Stat. Ann. § 19-102 (West 1990 & West Supp. 1997).

[6]*See, e.g.*, Wash. Rev. Code § 29.79.040, .050, .070 (1996); Alaska Stat. § 15.45.090 (Michie 1996); Cal. Elec. Code §§ 9008, 9011 (West 1996).

[7]Wash. Rev. Code § 29.79.040 (1996).

[8]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Alaska Stat. § 15.45.100 (Michie 1996).

[9]*See, e.g.*, Wash. Rev. Code § 29.79.100 (1996); Ariz. Rev. Stat. Ann. § 19-112 (West 1990 & West Supp. 1997).

[10]*See, e.g.*, Wash. Rev. Code § 29.79.490 (1996); Ariz. Rev. Stat. Ann. § 19-114.01 (West 1990 & West Supp. 1997).

have been collected to qualify the measure for the ballot.[11] Many states check all or a sample of signatures against voter registration records to determine whether the initiative qualifies for the ballot.[12] Some states require petition circulators to attach affidavits to the petitions they have circulated, attesting to the validity of the signatures on the petitions.[13]

2. All the amici states share an interest in preventing fraud in their ballot measure elections and qualification procedures. Obtaining a sufficient number of signatures in the petition circulation process is crucial to qualifying a measure for the ballot. States have recognized the possibility that initiative supporters could attempt to obtain access to the ballot through fraudulent means, and have laws prohibiting false or forged signatures on petitions.[14]

In Washington State, large scale forgeries have been committed on two recent initiative petitions. Each case involved approximately 3,500 forged signatures. In both cases, the forgeries were committed by petition circulators who were being paid on a piecemeal basis for each

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[11]*See, e.g.*, Wash. Rev. Code § 29.79.140(2) (1996) (initiative petitions to be filed four months prior to the date of the election); Ariz. Rev. Stat. Ann. § 19-121 (West 1990 & West Supp. 1997); Ariz. Const. art. IV, § 1(4).

[12]*See, e.g.*, Wash. Rev. Code § 29.79.200 (1996); Ariz. Rev. Stat. Ann. § 19-121.01 (West 1990 & West Supp. 1997).

[13]*See, e.g.*, Alaska Stat. § 15.45.130 (Michie 1996); Ariz. Rev. Stat. Ann. § 19-112C (West 1990 & West Supp. 1997).

[14]*See, e.g.*, Wash. Rev. Code § 29.79.440 (1996); Ariz. Rev. Stat. Ann. § 19-115 (West 1990); Alaska Stat. § 15.45.100 (Michie 1996); Colo. Rev. Stat. Ann. § 1-40-130 (West 1997).

signature collected. Three people pled guilty to forgery. One of these three admitted copying names out of the telephone book onto initiative petitions. These three guilty pleas did not account for all the forged signatures. There were three additional suspects whom officials were not able to prosecute.

In South Dakota, a petition circulator claimed she had collected several thousand petition signatures and was paid accordingly. The signatures were not submitted to the state, however; the circulator claimed the signatures had been destroyed in a motel room fire. The state prosecuted the circulator for deliberately setting the fire to conceal her failure to obtain the signatures for which she had been paid. The circulator was convicted of arson. Other instances of systematic forgeries and initiative petition fraud have been reported.[15]

3. Amici also share an interest in requiring disclosure to the public of how political committees organized to support or oppose ballot measures are raising and spending money to influence public opinion on ballot issues. Many states have laws requiring the disclosure of campaign finances. These laws are the states' counterpart to the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C.A. §§ 431-442 (1993). FECA pertains only to candidate elections, as there is no citizen-initiated legislation at the federal level. States have campaign finance disclosure laws pertaining both to candidate elections and ballot measures.[16]

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[15]Daniel H. Lowenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 188-94 (1989).

[16]*See, e.g.*, Wash. Rev. Code § 42.17.020(33), .080 (1996); Tenn. Code Ann. §§ 2-10-102(7), (10), -105 (1994); Alaska Stat. § 15.13.010(2)(b) (Michie 1996); Iowa Code § 56.4 (1991).

4. Like Colorado, other states have adopted various statutes which serve these two interests of ensuring election integrity and informing voters. Washington has a statute[17] which, like Colorado's statute[18], requires that the names and addresses and amounts paid to initiative petition circulators be disclosed in monthly reports filed with the state.[19] Arizona also requires disclosure of the petition circulator's status as paid or volunteer at the time of circulation.[20] Many other states require that petition circulators be registered voters in the state.[21]

SUMMARY OF ARGUMENT

1. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Court held that individuals who gather the signatures necessary to hold an election on a ballot measure engage in core political speech when they seek to persuade voters to sign an initiative petition. Petition circulators also engage in an important election function because they are entrusted with obtaining valid signatures from registered voters. The election function is distinct from the exercise of First

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[17]Wash. Rev. Code § 42.17.090(1)(g) (1996).

[18]Colo. Rev. Stat. Ann. § 1-40-121(2) (West 1997).

[19]Wash. Rev. Code § 42.17.090(1)(g) (1996) has also been challenged on First Amendment grounds. The United States District Court for the Western District of Washington upheld the constitutionality of this statute in an unpublished opinion dated March 20, 1998. *Washington Initiatives Now! v. Warheit*, No. C97-5427RJB.

[20]Ariz. Rev. Stat. Ann. § 19-102 (West 1990 & West Supp. 1997).

[21]*See, e.g.*, Alaska Stat. §§ 15.45.060, 15.45.110, 15.60.010(25), 15.05.010 (Michie 1996); Ariz. Rev. Stat. Ann. § 19-114 (West 1990 & West Supp. 1997); Or. Rev. Stat. § 260.560 (1997).

Amendment rights. For example, many states require that an initiative petition contain a title and summary prepared in the course of the initiative process. A petition circulator may engage in core political speech to advocate a ballot measure, but this does not give circulators the right to change the title or summary on the petitions they circulate. The Court applies different standards to determine the validity of laws governing these two different activities. Laws that burden core political speech are judged under strict scrutiny. On the other hand, the Court recognizes that states have a strong interest in assuring that elections are operated equitably and efficiently. Reasonable nondiscriminatory election regulations are valid under a lesser standard and are sustained based on the state's important interest in the election process.

2. Colorado's financial disclosure requirement involves the disclosure of payments to petition circulators. Since these circulators engage in core political speech, the court may apply strict scrutiny. Under *Buckley v. Valeo*, 424 U.S. 1 (1976), disclosure requirements meet the test of strict scrutiny. *Buckley v. Valeo* upheld similar disclosure requirements in the Federal Election Campaign Act of 1971, 2 U.S.C. § 434. The same rational applies to ballot measures. The state has a compelling interest in informing voters how money is spent in a ballot campaign. Equally compelling is the state's interest in preventing fraud in the signature gathering process. As in *Buckley v. Valeo*, Colorado's requirement is narrowly tailored to meet these compelling interests.

3. The financial disclosure requirement is also consistent with *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). In *McIntyre*, the Court struck down a law that prohibited anonymous handbills. The circuit court applied *McIntyre* to invalidate the financial disclosure requirement because it concluded that circulating a petition is akin to distributing a handbill. This is not correct. The

author of an anonymous handbill does not serve a state election function like a petition circulator does. Moreover, the author of a handbill may choose its content. Not so with an initiative petition where the content of the petition must be uniform and is determined in the initiative process. Another difference is that a paid petition circulator is part of an organized effort controlled by a political committee. This is not true of an individual who prepares an anonymous handbill. The financial disclosure requirement is valid under *Buckley v. Valeo*, and *McIntyre* does not require a different result.

4. Colorado's requirement that petition circulators disclose their identity and their status as paid or volunteer is valid under the flexible standard as a nondiscriminatory election requirement. This requirement serves two important interests. The status of a circulator as paid or volunteer provides voters with information to help them decide whether to sign the petition. The requirement that circulators disclose their identity helps prevent fraud in the signature gathering process. If the circulator's identity is known, voters and election officials can better enforce the election laws. The requirement will also help deter misrepresentation and fraud from occurring in the first place.

5. Colorado's requirement that petition circulators be registered voters is also valid as a nondiscriminatory election regulation. The Court has upheld reasonable registration requirements for voters. The same requirements are imposed on those who sign petitions. Since petition circulators serve an important state election function, it is reasonable to require registration. After all, it can be difficult for a state to enforce its elections laws against nonresidents. The registration requirement is not burdensome and is a reasonable election regulation.

ARGUMENT

I. Petition Circulators Serve An Important Function In The Election Process In Addition To Exercising Core Political Speech

In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court struck down a statute that prohibited paying people to gather signatures on an initiative petition. The Court reasoned that petition circulators would necessarily have to explain the proposal and why its advocates support it and concluded that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as core political speech". *Meyer*, 486 U.S. at 421-22.

There is no doubt that petition circulators do exercise core political speech when they explain and advocate a proposed ballot measure. However, petition circulators also serve an important function in the election process. The gathering of signatures to place an initiative on the ballot is analogous to gathering signatures to place a candidate on the ballot.[22] The purpose is to determine if there is enough support for the measure to hold an election on it. Petition circulators are entrusted with obtaining valid signatures from registered voters.

Although it is related to a petition circulator's exercise of core political speech, the election function of gathering signatures is distinct. For example, Colorado and Washington require that petitions bear a ballot title and summary of the measure that are prepared in the course of the initiative process. In Colorado, these functions are

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[22]There is an important state interest in requiring a preliminary showing of a significant modicum of support for a candidate, and reasonable regulations of the candidate nomination process are therefore consistent with the First Amendment. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

performed by the title board, in Washington by the Attorney General. A petition circulator may exercise core political speech to advocate for an initiative. But this First Amendment right does not extend to changing the title or summary on the petition. As part of the orderly election process, the state requires the title of the measure and the summary to be uniform.

In *Meyer*, this Court seemed to recognize these separate election functions when it relied on other limitations in the initiative election process to support its conclusion that the ban on paying signature gatherers was invalid. The Court noted that it was a crime to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *Meyer*, 486 U.S. at 427.

The point is that signature gathering is a combination of core political speech and the important election function of gathering valid signatures to determine if there is enough public support to hold an election. These separate but related functions are analyzed under different constitutional standards. This Court discussed this point in *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld a Hawaii law banning write-in ballots:

> "[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized *when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'* But *when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'* upon the First and Fourteenth

> Amendment rights of voters, '*the State's important regulatory interests are generally sufficient* to justify' the restriction." *Burdick*, 504 U.S. at 434 (emphasis added) (citations omitted).

Thus, regulations on core political speech are analyzed under a strict standard. Election regulations that do not burden core political speech are analyzed under a more lenient standard. The more relaxed standard of review is necessary for election regulations because:

> "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

When the proper standard of review is applied, all of the Colorado laws at issue in this case are valid.

II. Colorado's Campaign Finance Disclosure Requirement Comports With The First Amendment

Colo. Rev. Stat. Ann. § 1-40-121 (West 1997) requires initiative petition proponents to file monthly reports stating the name and address of persons paid to circulate the petition and the amount paid to the circulator for the month in question.[23]

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[23]Washington has a similar statute. Wash. Rev. Code § 42.17.090(1)(g) (1996). Wash. Rev. Code § 42.17.090 (1996) is the statue which sets forth the content of required campaign finance disclosure reports. It applies to both candidate elections and ballot measures. At the time subsection (g) was added to § 42.17.090, the Washington State Legislature made the following finding:

> "The legislature finds that paying a worker, whose task it is to secure the signatures of voters on initiative or referendum petitions, on the basis of the number of signatures the worker secures on the petitions encourages the introduction of fraud in the signature gathering process. Such a form of payment may act as an incentive for the worker to encourage a person to sign a petition which the person is not qualified to sign or to sign a petition for a ballot measure even if the person has already signed a petition for the measure. Such payments also threaten the integrity of the initiative and referendum process by providing an incentive for misrepresenting the nature or effect of a ballot measure in securing petition signatures for the measure." Wash. Rev. Code § 29.79.500 (1996).

The Court applied exacting scrutiny in *Meyer v. Grant* because, in the Court's view, petition circulators engage in core political speech. *Meyer*, 486 U.S. at 420. Initiative proponents who hire petition circulators pay the circulators not only to engage in the election related function of gathering signatures, but also to engage in whatever speech may be necessary to persuade voters to sign the petition. Assuming the Court might determine that Colorado's finance disclosure requirement is subject to strict scrutiny, the statute survives such scrutiny.

A. Campaign Finance Disclosure Requirements Survive Strict Scrutiny

1. In *Buckley v. Valeo* This Court Sustained Disclosure Requirements In Federal Elections

States have a compelling interest in the integrity of their elections. *Eu v. San Francisco Cy. Democratic Central Comm.*, 489 U.S. 214, 231 (1989). This state interest is just as compelling as the interest of the federal government in the integrity of the federal election

process. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld under the First Amendment the constitutionality of the disclosure requirements contained in the Federal Election Campaign Act of 1971, 2 U.S.C. § 434. The FECA disclosure requirements require periodic reports detailing contributions to and expenditures by candidates for federal offices. The Court applied exacting scrutiny to the FECA disclosure requirements. *Buckley v. Valeo*, 424 U.S. at 64-65. Nevertheless, the Court determined that there are three governmental interests in disclosure of campaign finances sufficiently important to outweigh the possibility of infringement of First Amendment rights.

First, to inform:

> "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office". *Buckley v. Valeo*, 424 U.S. at 66-67.

Second, to deter corruption:

> "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election". *Buckley v. Valeo*, 424 U.S. at 67.

Third, to detect violations:

> "[R]ecordkeeping, reporting, and disclosure requirements are an essential means of gathering data necessary to detect violations

> of [FECA's] contribution limitations". *Buckley v. Valeo*, 424 U.S. at 67-68.

When weighed against the potential infringement of First Amendments rights, the Court concluded: "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist". *Buckley v. Valeo*, 424 U.S. at 68.

Under *Buckley v. Valeo*, it is not necessary that a statute serve all three purposes in order to pass constitutional muster. In *Buckley v. Valeo*, the Court upheld FECA's disclosure requirement relating to certain independent expenditures, even though the only purpose served was "the informational interest". *Buckley v. Valeo*, 424 U.S. at 81.

2. Disclosure Requirements Apply Equally To Ballot Measures

Buckley v. Valeo addressed candidate elections because FECA pertains only to candidate elections. However, in two decisions addressing state ballot measure elections, the Court has acknowledged that the states have an interest in requiring disclosure relating to the financing of ballot measure elections.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), addressed the constitutionality of a state statute which prohibited expenditures by banks and certain business corporations for the purpose of influencing the vote on certain ballot measures. The Court struck down the state's prohibition on these contributions as an unjustified restriction on speech. However, in doing so, the Court seemed to approve disclosure requirements as the constitutional means of serving the state's interest in informing the electorate concerning the merits of a ballot measure:

> "*Identification of the source of advertising may be required as a means of disclosure*, so that the people will be able to evaluate the arguments to which they are being subjected. In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (emphasis added) (citations omitted).

In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), a city ordinance placed a $250 limit on contributions to committees formed to support or oppose ballot measures. The Court struck down the ordinance in part because section 112 of the law required disclosure:

> "Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since *contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting*.
>
> ". . . The public interest allegedly advanced by § 602—identifying the sources of support for and opposition to ballot measures—is insubstantial because *voters may identify those sources under the provisions of § 112*." *City of Berkeley*, 454 U.S. at 298-99 (emphasis added) (citations omitted).

In both *Bellotti* and *City of Berkeley*, the Court stated that there is not the same risk of corruption in ballot measure elections as in candidate elections. Nevertheless, the Court appeared to adhere to the principle established in *Buckley v. Valeo*, approving disclosure of campaign contributions and expenditures as the narrowly tailored

means of addressing election corruption, even in the ballot measure context.

Colorado, Washington, and other states which allow voters to vote on proposed legislation by placing the legislation on the ballot, have determined that it is important to facilitate disclosure of the finances of those supporting and opposing the new legislation. Disclosure of who is contributing money to influence public opinion, and how that money is being spent, provides information that assists the public to evaluate arguments in support of or against the ballot measure. The Tennessee Supreme Court accurately described this state interest in *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987):

> "The informational purpose of disclosure is no less compelling in referenda. . . . *Vigorous, free, well-informed, and public debate can only be enhanced by disclosure of campaign financing in both referenda and candidate elections*. No faction with access to substantial financial resources should be able to distort the process by flooding the forum with media campaigns without at least disclosing this fact to the voters. *Any group that wishes to participate in the process through the financing of election outcome specific advocacy should reveal the extent of this financial involvement to the public.*" *Bemis*, 731 S.W.2d at 904 (emphasis added); *see also Iowans for Tax Relief v. Campaign Finance Disclosure Commission*, 331 N.W.2d 862, 868 (Iowa 1983).

The debate regarding a ballot measure is very significant. Unlike candidate elections which occur periodically to provide the people with a new opportunity to reject unpopular or corrupt officials, ballot measures

"often commit the state . . . to what may be, as a practical matter, essentially irreversible and costly courses of action". *Bemis*, 731 S.W.2d at 904. For example, in Washington, a law enacted by the people cannot be repealed for two years and can only be amended during that period with a two-thirds vote.[24] Thus, when the people enact a law, they take action that cannot be easily modified.

B. Colorado's Disclosure Requirement Is A Narrowly Tailored Regulation Serving Important State Interests

The Colorado disclosure requirement serves two important state interests.

First, proponents of an initiative petition who expend money in an attempt to influence voters to sign a petition are expending money to influence public opinion as part of an election process. Therefore, states require such groups to register and file reports during the petition circulation period.[25] This is the kind of disclosure the Court approved with respect to candidate elections in *Buckley v. Valeo* and appeared to approve with respect to ballot measures in *First National Bank of Boston v. Bellotti* and *Citizens for Rent Control v. City of Berkeley*. Disclosure requirements—as opposed to prohibitions against or limits on contributions or expenditures—have been viewed by the Court as the narrowly tailored means of addressing the government's interest in deterring or detecting fraud, and providing information about campaign financing to assist voters in evaluating ballot issues.

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[24]Wash. Const. art. II, § 1(c).

[25]*See, e.g.*, Wash. Rev. Code § 42.17.040, .080 (1996).

The second interest is to help states deter and detect fraud in the petition circulation process. In Washington State, recent cases of large scale forgeries involved persons paid on a piecemeal basis to gather petition signatures. In each case, supporters of the initiative paid circulators for approximately 3,500 forged signatures. Thus, there is a real problem with fraud in petition circulation. The problem is closely related to the practice of paying petition circulators on a piecemeal basis.

The Colorado disclosure requirement is valid under a straightforward application of *Buckley v. Valeo* where this Court also recognized the important informational function of pre-election disclosure. *Buckley v. Valeo*, 424 U.S. at 68 n.82. Because of the importance of pre-election disclosure, the Court rejected the argument that pre-election disclosure requirements should be struck down because post-election disclosure is more narrowly tailored. *Id.* Here, the court should likewise reject the circuit court's view that it is sufficient for disclosure to occur at the end of the circulation period. Voters may wish to know during the circulation phase how political committees are spending money to influence public opinion either in support of or in opposition to the petition. Such information better informs the voters regarding the proposed legislation at the time they are deciding whether to sign the petition, i.e. at the time they are deciding whether the proposed legislation merits placement on the ballot.

In addition, if the names and addresses of petition circulators are known only at the end of the circulation period, any investigation into suspected forgeries can be seriously hampered. For example, in Washington, many persons who have been hired to circulate petitions frequently change addresses. In one case, law enforcement was unable to locate one of the suspected forgers. In addition, if there is no disclosure of names for several months and officials find it difficult to locate forgers, the

potential deterrent effect of a disclosure requirement is lessened.

The circuit court, in striking down Colorado's disclosure requirement, read *Buckley v. Valeo* too narrowly and placed too much emphasis on its perception that compelling disclosure of paid circulators' identities "chills paid circulation". *American Const. Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1105 (10th Cir. 1997).[26] In *Buckley v. Valeo*, the Court weighed the potential effect of disclosure on political speech; that is why the Court applied strict scrutiny to FECA disclosure requirements. *Buckley v. Valeo*, 424 U.S. at 66-67. Nevertheless, disclosure requirements were found to pass strict scrutiny. The *Buckley* plaintiffs showed only that one or two persons declined to make contributions to a minor political party. *Buckley v. Valeo*, 424 U.S. at 71-72. The Court concluded that the substantial public interest in disclosure outweighs such generalized allegations of harm. *Id.* at 72.[27]

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[26]Despite Washington's requirement to disclose the identities of petition circulators on a monthly basis, political committees supporting initiatives which have the money to hire petition circulators have been very successful in obtaining sufficient signatures to secure a place on the state ballot. In 1996-97, seven initiatives to the people collected sufficient signatures to be placed on the ballot. Six of the seven used paid signature gatherers and filed monthly disclosure reports. No initiatives to the people employing paid signature gatherers failed to make the ballot.

[27]In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), the Court found the record sufficient to show that the potential threat to speech outweighed the benefits of campaign finance disclosure. The record in the *Brown* case reflected a long history of violence, terminations from employment, hate mail, and FBI surveillance endured by members of the Socialist Worker's Party. The circumstances in *Brown* were found to be sufficient to exempt the Socialist Workers '74 Campaign Committee from the disclosure requirements. However, absent a similar showing, FECA disclosure requirements can be constitutionally applied to all other groups. *See Buckley v. Valeo*, 424 U.S. at 71-72.

The fact that circulators may be prosecuted for their misconduct is no barrier to the adoption of other narrowly tailored regulations which serve the important government interests identified here. *See Burson v. Freeman*, 504 U.S. 191, 206-07 (1992) (existence of criminal sanctions for voter intimidation insufficient reason to strike down 100-foot electioneering ban); *Buckley v. Valeo*, 424 U.S. at 27-28 (existence of bribery statute does not preclude need for political contribution limits). In this regard, the circuit court erred.

C. *McIntyre v. Ohio Elections Commission* Does Not Apply To Petition Circulators

The circuit court also incorrectly applied *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and other cases discussing anonymous speech, to Colorado's monthly disclosure requirement. The circuit court concluded that "[c]irculating a petition is akin to distributing a handbill." *American Const. Law Found.*, 120 F.3d at 1103. This conclusion is wrong for two reasons.

First, circulating a petition is very different than distributing a handbill. Unlike a citizen who merely wishes to speak, the petition circulator performs a function in the election process. Petition circulators have the responsibility to ensure the integrity of the signatures they solicit in the initial phase of the ballot measure election process.

The content of Mrs. McIntyre's handbill was entirely determined by Mrs. McIntyre. A petition circulator does not have the same total freedom of speech.

Some elements of the petition circulator's speech must be regulated to maintain the integrity and order of the election process. For example, the objective title and summary of the proposed legislation which Colorado, Washington, and other states require constitute information the circulator must provide in the course of soliciting signatures. Unlike Mrs. McIntyre, petition circulators cannot change the title and summary to suit themselves. *Meyer v. Grant* noted that, in Colorado, petitions must contain an admonition to signatories not to sign unless they have read and understood the proposed initiative. *Meyer*, 486 U.S. at 427, 427 n.8. Nothing in *Meyer* supports the notion that petition circulators may simply omit this statement from their petitions as an exercise of First Amendment rights.

Such election regulations are valid because the government must play an active role in structuring elections; there must be substantial regulation of elections if they are to be fair, honest, and orderly. *See Burdick*, 504 U.S. at 433.

The second difference between a person who distributes handbills, like Mrs. McIntyre, and a paid petition circulator is that a paid petition circulator is part of an organized effort controlled by a political committee collecting contributions and making expenditures for the purpose of influencing public opinion on a ballot measure. By contrast, Mrs. McIntyre's speech was described by the Court as an "independent communication". *McIntyre*, 514 U.S. at 354. In *McIntyre*, the Court noted the important distinction between independent and campaign-financed political activity:

> "A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue." *McIntyre*, 514 U.S. at 355.

Not only is disclosure of the author of an anonymous handbill intrusive, it "adds little, if anything, to the reader's ability to evaluate the document's message". *McIntyre*, 514 U.S. at 348-49.

In contrast, financial disclosure provides important information to the people in deciding whether to sign a petition or vote for a ballot measure. Thus, financial disclosure is more informative and less intrusive. As the Court observed in *McIntyre*:

> "Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation." *McIntyre*, 514 U.S. at 355.

In *McIntyre*, the Court recognized that under *Buckley v. Valeo*, the First Amendment may allow a more narrowly drawn statute than Ohio's open-ended prohibition on all anonymous political literature. *McIntyre*, 514 U.S. at 356. Requiring monthly disclosure of the expenditures to petition circulators during the petition circulation period is just such a more narrowly drawn statute. Such a disclosure reveals only that the person was paid to circulate the petition. It does not reveal as much about the petition circulator as a handbill does about its author. It does not even necessarily reveal whether the circulator

agrees with the initiative petition. Moreover, such a disclosure requirement reveals the petition circulator's identity days or weeks after the speech has occurred. Therefore, the circulator's identity is not part of whatever exchange of political views may occur at the time the voter is deciding whether to sign the initiative petition.

III. Colorado's Requirement That Petition Circulators Be Identified And Their Status As Paid Or Volunteer Be Disclosed Does Not Violate The First Amendment

Colo. Rev. Stat. Ann. § 1-40-112(2) (West 1997) requires petition circulators to wear a badge disclosing two pieces of information: (1) the circulator's name and (2) status as paid or volunteer. These requirement serve important elections functions and the burden imposed on First Amendment rights is minimal. When "a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions". *Burdick*, 504 U.S. at 434.

The two pieces of information required by Colorado serve two important regulatory interests. First, the status of a petition circulator as paid or volunteer provides important information to the public. The states have an interest in fostering an informed electorate. *Eu*, 489 U.S. at 228. Consistent with that interest, states can require that certain information be provided to voters in the petition circulation process. *See, e.g., Meyer v. Grant*, 486 U.S. at 427 (admonition to read and understand petition); Wash. Rev. Code § 29.79.070 (ballot title and summary requirement). Whether a circulator is paid or volunteer is also important information that may affect some voters' decisions about whether to sign a petition.

Second, the identity of the petition circulator provides important information to help eliminate fraud. The state has a strong interest in preventing election fraud and avoiding confusion and deception in the election process. *Burson*, 504 U.S. at 199; *Jenness*, 403 U.S. at 442. In *Meyer v. Grant*, the Court thought that the risk of fraud and corruption was more remote at the petition stage. *Meyer*, 486 U.S. at 427. However, experience has shown that there is a significant problem with fraud in the gathering of petition signatures. *See* p. 3-4 *supra*. The state has a significant interest in preventing this fraud.

If a circulator's identity is available information, voters or officials who observe fraud or misrepresentation in circulation can better enforce election laws relating to the petition process. Moreover, the requirement that circulators identify themselves could have the effect of deterring misrepresentation or fraud from occurring in the first place.

The Colorado requirement to disclose a petition circulator's identity and status as paid or volunteer is narrowly tailored to the state's election needs. It only applies to petition circulators. It would not apply to someone who wished to distribute an anonymous handbill expressing the author's views on a ballot measure. The requirement does not burden core political speech and is valid.

IV. Colorado's Requirement That Petition Circulators Be Registered Voters Does Not Violate The First Amendment

Colorado and many other states require that petition circulators be registered voters of that state. Colo. Const. art. V, § 1(6); Colo. Rev. Stat. Ann. § 1-40-112(1) (West 1997); note 21 *supra*. Such a requirement also survives the lesser scrutiny applied to election regulations.

Voter registration requirements serve the compelling state interest in preventing voter fraud. *Dunn v. Blumstein*, 405 U.S. 330, 345-46 (1972). Even though registration requirements may preclude some people from voting in a given election, the Court allows states to impose reasonable residency requirements because of the state's compelling interest. *Dunn*, 405 U.S. at 343. Even in *Meyer v. Grant*, the Court noted that petition circulators in Colorado must be registered voters. Moreover, the Court implicitly recognized that states have a compelling interest in limiting initiative petition signing to registered voters. *See Meyer*, 486 U.S. at 417, 426-27, 427 n.8.

The requirement placed on circulators is the same as that placed on voters and petition signers. The registration requirement is not burdensome; typically, registering to vote is a readily available and quick process. The benefits to the election process outweigh this minimal burden. There is a record of fraud committed by petition circulators. It can be difficult for a state to enforce its laws against non-residents. *See American Const. Law Found.*, 120 F.3d at 1100 (Colorado Secretary of State subpoena power does not extend beyond Colorado's borders). Requiring that petition circulators be registered voters is a reasonable regulation, because it assists the state in finding violators and enforcing state election laws.

CONCLUSION

The circuit court's opinion should be reversed. Colorado's financial disclosure requirement meets the strict scrutiny test under *Buckley v. Valeo*, because it is a narrowly tailored election regulation in which the state has

a compelling interest. Colorado's other requirements are valid as reasonable election requirements that do not burden core political speech.

Respectfully submitted.

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